

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**





76-6055

*Signed*

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

*B*  
*P/S*

FRANCESCO GALESI,

Plaintiff-Appellee

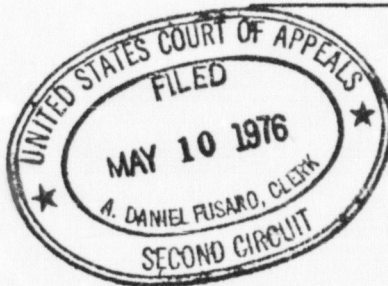
v.

UNITED STATES OF AMERICA,  
INTERNAL REVENUE SERVICE,

Defendants-Appellants

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF VERMONT

BRIEF FOR THE APPELLANT



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---

STATEMENT OF THE ISSUE PRESENTED

Whether the District Court erred in holding that a federal tax lien, filed more than 30 days before the redemption date, was discharged in a state "strict foreclosure" proceeding when actual notice was not given to the United States.



STATEMENT OF THE CASE

This case involves the discharge of federal tax liens under Section 7425 of the Internal Revenue Code of 1954. On January 15, 1976 (R. 19), <sup>1/</sup> the District Court entered its judgment discharging the lien and on March 10, 1976, the United States filed a timely notice of appeal (R. 20). Jurisdiction of this Court is based on 28 U.S.C., Section 1291.

The relevant facts are not in dispute and may be summarized as follows. Chemical Bank held two mortgages on the real property in question. The mortgagor defaulted and, on September 10, 1973, Chemical Bank filed a complaint for foreclosure. (R. 10.) At the time the complaint was filed, the United States had not filed its tax lien and it was not named as a party to the foreclosure. The tax lien was filed eight days later on September 18, 1973. (R. 10-11.) On February 11, 1974, approximately five months after the lien was filed, the state court entered its judgment of foreclosure and redemption days were assigned. In spite of filing of the tax lien, there was no attempt to make the United States a party. The property was redeemed by Frank Galesi, the appellee in this case. (R. 11.) Thereafter, Galesi brought a state action, naming the the United States as a party, for a declaratory judgment seeking to discharge the lien. (R. 1-3.) Pursuant to 28 U.S.C., Section 1444, the United States removed the case to the United States District Court for the District of Vermont. (R. 4-6.)

1/ "R." references are to the separately bound record appendix.

The District Court, on cross-motions for summary judgment, held that the state foreclosure proceeding constituted a "judicial proceeding" within the meaning of Section 7425(a) of the Code and that, since the tax lien was not filed prior to the initiation of the foreclosure proceeding by Chemical Bank, the federal tax lien was discharged under Section 7425(a). (R. 11-15, 16.) This appeal follows.

#### ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING  
THAT A FEDERAL TAX LIEN, FILED MORE  
THAN 30 DAYS BEFORE THE REDEMPTION  
DATE, WAS DISCHARGED IN A STATE  
"STRICT FORECLOSURE" PROCEEDING WHEN  
ACTUAL NOTICE WAS NOT GIVEN TO THE  
UNITED STATES

##### A. Introduction and Summary of Argument

The narrow issue presented by this appeal is whether the Vermont "strict foreclosure" proceeding brought by Chemical Bank is a "judicial proceeding" within the meaning of Section 7425(a) of the Internal Revenue Code of 1954, Appendix, infra. If the proceeding is within Section 7425(a), since the lien was not filed at the time the action was commenced, the lien would be discharged under Section 7425(a)(2). On the other hand, it is apparently undisputed that, if Section 7425(a) is inapplicable, since the lien was filed more than 30 days prior to the date of redemption, the lien is not disturbed. Sec. 7425(b)(1). Essentially, the position of the United States is that proceedings within the scope of Section 7425(a) must seek a judicial sale in foreclosing a mortgage. Thus, since the Chemical Bank foreclosure was in the nature of "strict foreclosure" and sought only to foreclose the mortgagor's equity of redemption,



Section 7425(a), contrary to the holding below, does not provide a statutory basis for discharging the lien and, indeed, under Section 7425(b)(1), the lien is specifically preserved. We turn now to discuss the foreclosure by Chemical Bank and how that type of action is treated by the pertinent statutes.

B. The Chemical Bank foreclosure proceeding

As of the date of the complaint filed by Chemical Bank (September 10, 1973), Vermont statutes recognized essentially two methods for foreclosing mortgages. The method generally used is based on 12 Vt. Stat. Ann., § 4526, Appendix, infra, and the procedure is governed by Rule 80.1, Vermont Rules of Civil Procedure, <sup>2/</sup>Appendix, infra. Essentially Rule 80.1 provides for the filing of a complaint praying "that defendant's equity of redemption in the premises be foreclosed." Rule 80.1(b), Vermont Rules, Appendix, infra. Upon the filing of a motion for summary judgment, the defendant by affidavit must disclose facts constituting a defense, otherwise a judgment of foreclosure will be entered (Rule 80.1(c), Vermont Rules, Appendix, infra), and a redemption day will be assigned (Rule 80.1(d), Vermont Rules, Appendix, infra). If redemption is not made within the period assigned, a writ of possession issues divesting the mortgagor of possession. 12 Vt. Stat. Ann., § 4528, Appendix, infra. The general procedure does not provide for a judicial sale of the property. This type of action referred to a "strict foreclosure"

<sup>2/</sup> Rule 80.1 was amended, effective April 1, 1975.

and is, as one commentator notes, "available \* \* \* only to the record owner of the interest in land, that is, to the mortgagee in a title state, or to the purchaser of an incomplete foreclosure in a state of the lien persuasion." 3 Powell, Real Property, par. 469, p. 696.35. In short, under the Vermont Statutes and rules, in the event that the mortgagor or other junior lienor fails to redeem, "strict foreclosure" discharges the mortgagor's equity of redemption and the junior liens. As Professor Powell points out, Vermont is one of the few title states where "strict foreclosure" is a "primary method of foreclosure." (Ibid.) See also Note, 25 Va. L. Rev. 647 (1939).

Effective April 12, 1973, Vermont enacted a statute providing that a decree of foreclosure may order a sale of the property, if no redemption is made and "if a lien or interest in such realty is held by any person or federal agency which may not be foreclosed by strict foreclosure pursuant to federal law." 12 Vt. Stat. Ann., § 4531, Appendix, infra.<sup>3/</sup> The Reporter's Notes accompanying the 1975 amendment to Rule 80.1, Vermont Rules, Appendix, infra, state that when Section 4531 is used, the proceedings "should be commenced and conducted under the rule so far consistent [sic] with the purposes of these statutes." 12 Vt. Stat. Ann., Rules of Civil and Appellate

<sup>3/</sup> We have been advised by the Office of the Secretary of State for Vermont that there is no official legislative history of this statute. It is not unreasonable to assume, however, that the Legislature was prompted by the decision in City Sav. Bank of Bridgeport v. Lawler, 163 Conn. 149, 302 A. 2d 252 (1972) in which the Supreme Court of Connecticut cast strong doubt on the question whether Connecticut's "strict foreclosure" procedure would ever discharge a federal tax lien. Whether such fears are well founded need not be decided here.



Procedure, 1975 Cumulative Pocket Supplement, p. 32. Presumably then, if a federal tax lien has been filed which might not be discharged by "strict foreclosure," the complaint should pray that a sale be held if redemption subject to the lien is not made. It also would appear reasonable to assume under the rules that if, during the general "strict foreclosure" proceeding, such a lien is discovered, the foreclosing party should amend his complaint to join the United States as a party to provide for a sale, if the lien is to be discharged.

In the instant case, Chemical Bank proceeded with the general "strict foreclosure," did not seek a judicial sale<sup>4/</sup> and no sale was ordered. The question whether the lien was discharged turns, therefore, on whether a foreclosure action which

<sup>4/</sup> The complaint sought (Complaint and Petition for Foreclosure, Bennington County Court, Civil Action Docket No. C-94-73 BC, filed September 10, 1973, p. 14):

"WHEREFORE, CHEMICAL BANK, the Plaintiff herein prays:

(a) That the equity of redemption of the Defendants be foreclosed agreeable to the provisions of law;

(b) That pursuant to the provisions of Rule 80.1(d) of the Vermont Rules of Civil Procedure the time for redemption by law be shortened;

(c) That a hearing on this matter to shorten the time of redemption be had pursuant to the provisions of the Vermont Rules of Civil Procedure;

(d) That in the event of the failure of the defendants to redeem, they be forever foreclosed from any further rights in the premises;

(e) That the Court fix and allow solicitor's fees, funds advanced for taxes and insurance premiums, and other costs and expenses incident to this proceeding;

(f) And, for such other and further relief in the premises as the nature of this case may require and as to this Honorable Court may deem meet.

does not seek a judicial sale, when the United States is not joined as a party, can discharge a lien under Section 7425(a) of the Code, as the District Court held.

C. A judicial sale is required under Section 7425(a) to discharge a federal tax lien

In order to understand the interrelationship among the various statutory provisions relating to the discharge of federal tax liens in mortgage foreclosure proceedings, it is helpful to delineate the basic situations which arise and indicate how the liens are affected by the provisions of the Federal Tax Lien Act of 1966, P.L. 89-719, 80 Stat. 1125. If the United States has a lien, regardless of whether the lien has been filed or not, 28 U.S.C., Section 2410, Appendix, infra, waives sovereign immunity in certain types of actions--e.g., foreclosure of mortgage, quiet title, partition, etc.<sup>5/</sup>--and also provides that, if the United States is named as a party in such an action, the discharge of the lien will be governed by local law.<sup>6/</sup> Section 2410(c) specifically provides, however, that an action to foreclose a mortgage must seek a "judicial sale." Thus, the general rule under Section 2410 is that, if the United States is named as a party to a mortgage foreclosure, the foreclosing mortgagee must seek a judicial sale of the property in order to discharge the lien. City Savings Bank of Bridgeport v. Lawler, 163 Conn. 149, 302 A. 2d (1972).

<sup>5/</sup> Sec. 2410(a), Appendix, infra.

<sup>6/</sup> Sec. 2410(c), Appendix, infra.



Another situation which arises is where the United States has a lien but is not made a party to the foreclosure. Discharge in this situation is governed by Section 7425 of the Internal Revenue Code and is concerned with two separate types of actions--"Judicial Proceedings" (7425(a), Appendix, infra), "Other Sales" (7425(b), Appendix, infra). Section 7425(a) defines "judicial proceedings" as "any civil action or suit described in subsection (a) of Section 2410 of title 28 \* \* \*, or a judicial sale pursuant to such a judgment." If the tax lien has been properly filed, a "judicial proceeding," in which the United States is not joined, will not disturb the lien (Sec. 7425(a)(1)); as to a lien which has not been so filed, however, discharge will be governed by local law (Sec. 7425(a)(2)). In the event that the lien is discharged, the United States still may claim against the proceeds of such sale until the proceeds are distributed. Sec. 7525(a).

The second situation covered by Section 7425 is where the United States is not joined as a party and foreclosure is "pursuant to a nonjudicial sale under a statutory lien on such property."<sup>7/</sup> Sec. 7425(b). Discharge in this situation is somewhat more complicated, depending on when the lien was filed

<sup>7/</sup> Section 7425(b) also applies sales of property "made pursuant to an instrument creating a lien on such property, pursuant to a confession of judgment or the obligation secured by such an instrument."

and whether actual notice is given. If the lien was filed when foreclosure was commenced, or filed more than 30 days prior to a nonjudicial sale,<sup>8/</sup> the lien is not disturbed unless actual notice was given to the United States not less than 25 days prior to the sale. Secs. 7425(b)(1) and 7425(c)(1), Appendix, infra. On the other hand, if no lien is filed or if actual notice is given, local law will govern discharge. Sec. 7425(b)(2).

It is the position of the United States that the "strict foreclosure" proceedings initiated by Chemical Bank from which the appellees title is derived, was a proceeding under Section 7425(b) and, therefore, contrary to the holding below, the foreclosure did not discharge the tax lien under Section 7425(a)(2). Simply stated, we believe that, if discharge is to be effected under 7425(a), the foreclosing mortgagee must seek a judicial sale. This position is supported by language of the statutes, their legislative history and the Treasury Regulations promulgated thereunder.

In order for discharge to be effected under Section 7425(a), the action must be of the type described in Section 2410 and, therefore, if the action seeks to foreclose a mortgage, under 2410(c), a "judicial sale" is required. Section 7425(a) also

<sup>8/</sup> In discussing "strict foreclosure," proceedings the Regulations treat the date of the nonjudicial sale as being the date of the expiration of the equity of redemption. See Temporary Regulations Under the Federal Tax Lien Act of 1966, § 400.4-1(b)(2) (Example 3), infra, p. 12. See also 12 Vt. Stat. Ann., § 4528.



provides that if a "judicial sale" discharges the lien, the United States may claim against the proceeds of the sale prior to distribution.<sup>9/</sup> It would seem clear then from the face of the statutes that a judicial sale is intended as the only method for discharging liens in a mortgage foreclosure action under Subsection (a).

This interpretation of Section 7425(a) is consistent with the legislative history. The American Bar Association's original proposal would "permit the non-judicial sale, where authorized to discharge a junior federal lien, subject to giving the Government advanced notice so that it may protect its interest." A.B.A., Final Report of the Committee on Federal Liens (1959), Appendix I, p. 47, House Hearings before the Committee on Ways and Means on Priority of Federal Tax Liens and Levies, 89th Cong., 2d Sess., p. 75. The draft of the ABA's proposed statutory changes in effect combined the present Sections 7425(a) and (b) in a proposed amendment to Section 2410 of 28 U.S.C. Final Report, supra, Appendix II, pp. 128-130. Among the proposed amendments was the express provision that "It shall not be necessary to the jurisdiction that the complaint demand a sale of the property." Ibid, p. 128. This approach was modified when H.R. 11256, 89th Cong., 2d Sess., was introduced. H.R. 11256 contained provisions virtually identical to the present Section 7425 and Section 2410 and specifically provided for a judicial sale in mortgage foreclosure actions.

<sup>9/</sup> In effect, the lien is transferred to the proceeds and continues until distribution.

See H.R. 11256, 89th Cong., 2d Sess., Secs. 109, 201. See also H.R. 11290, 89th Cong., 1st Sess., Secs. 109, 201. The accompanying Committee Report makes it clear that Section 7425(a) requires a judicial sale of the property. H. Rep. No. 1884, 89th Cong., 2d Sess., p. 26 (1966-2 Cum. Bull. 815, 833). This report provides:

(1) Plenary foreclosure actions (Sec. 7425(a) of the code)

\*

\*

\*

Where a notice of tax lien is not filed before a plenary proceeding commences--even in those cases where the filing is not required, such as in the case of a special lien for estate and gift taxes--a judicial sale is to have the same effect with respect to a tax lien as local law provides with respect to such matters. One exception is provided to this rule: Where the Government is not joined as a party and the sale discharges the tax lien, the Government may still assert its claim against the proceeds of the sale \* \* \* [prior to distribution]. (Emphasis supplied.)

(2) Other foreclosure proceedings (sec. 7425(b) of the code)

The bill provides that, in the case of all other foreclosure proceedings, where timely notice \* \* \* to the Government, the Government's claim to [the] property under a tax lien is to be discharged in the manner provided by local law. (Emphasis supplied.)

Based on the foregoing, the Treasury's Regulations provide that Section 7425(b), rather than 7425(a), controls the discharge of liens when a "nonjudicial sale" or other type proceeding. The Regulations state, inter alia, (Temporary Treasury Regulations Under the Federal Tax Lien Act of 1966, § 400.4-1(a)(1), and (b)(1)):

These judicial proceedings [relating to Section 7425(a)] are plenary in nature and proceed on formal pleadings. Section 7425(b) contains provisions relating to the discharge of a lien or title derived from the enforcement of a lien in the event of a nonjudicial sale with respect to the property involved. (Emphasis supplied.)

\*

\*

\*



For the purpose of this section [7425(b)], such a sale is referred to as a "nonjudicial sale." The term "nonjudicial sale" includes, but is not limited to, the divestment of the taxpayer's title to property which occurs by operation of law, as well as those which result from a public or private sale.

The Regulations give specific examples of "nonjudicial sales," including a specific example of a "strict foreclosure" type of proceeding (Temporary Treasury Regulations Under Tax Lien Act of 1966, Section 400.4-1(b)(2) (Example 3):

Under the law of O State, upon breach by a mortgagor of real property of one of the conditions of the mortgage, the mortgagee may foreclose the mortgage by securing possession of the property by one of several procedures provided by statute. These procedures are generally referred to as "strict foreclosure." In order for a foreclosure to be effective under these procedures, a certificate attesting the fact of entry must be recorded with the proper registrar of deeds within 30 days after the mortgagee enters the property. During the 1-year period following the date on which the certificate of entry is recorded, the mortgagor or a junior lienor may redeem the property by paying the mortgagee the amount of the mortgage obligation. If, during such 1-year period the property is not redeemed and the mortgagee's possession is continued, the interest of the mortgagor and the junior lienors in the property are divested. For purposes of this section, such a foreclosure procedure is a nonjudicial sale described in section 7425(b) since it results in the divestment of the mortgagor's interest in the property by operation of law pursuant to the mortgage which created a lien on the property. In addition, since there is no public or private sale which directly results in the divestment of junior liens on the property, the date of sale, for purposes of computing a period of time determined with reference to the date of sale, is the date on which the 1-year period following the recording of the certificate of entry expires.

The District Court rejected this analysis of the statute. Its opinion, while somewhat unclear, seems primarily to be based on the contention that the United States had constructive notice<sup>10/</sup> of the sale pursuant to 12 Vt. Stat. Ann., § 4523 and did not seek to intervene. The initial flaw in this analysis is that it is the type relief sought in the Chemical Bank foreclosure action (i.e., whether a judicial sale is sought) which controls the applicability of Sections 7425(a) and (b). If the foreclosure is within Section 7425(a), discharge is governed by whether or not the lien was filed, and notice is not a factor. On the other hand, actual notice (see Section 7425(c)(1)) is one of the basic factors in determining whether a lien is discharged under Section 7425(b). Compare Section 7425(b)(1) with Section 7425(b)(2)(C).

Perhaps more important, however, the use of constructive notice in state proceedings to discharge federal tax lien was one of the basic considerations in the enactment of these provisions in the Federal Tax Lien Act of 1966. The Assistant Secretary of the Treasury statement before the Ways and Means Committee contain the following comment (House Hearings, supra, p. 56):

<sup>10/</sup> In its opinion the court first stated that the United States had notice of the foreclosure action. (R. 14.) Later, it simply noted that "the United States had, at least, constructive notice." (R. 16.) In its answer, the Government specifically alleged that notice, within Section 7425(c)(1) was not given (R. 9) and there is nothing to indicate the United States had actual notice.



Under many State statutes, junior liens may be extinguished without the lienor being joined in a foreclosure action. In some States, property subject to a mortgage or a deed of trust may be sold by the trustee without any judicial action and junior liens will be cut off by the sale. The Supreme Court has ruled that a Federal tax lien may, if State law so provides, be extinguished by such judicial or nonjudicial sales (U.S. v. Brosnan (1960) 363 U.S. 237). As a result, tax liens are sometimes extinguished without the United States having actual notice of the foreclosure action or nonjudicial sale. Under these circumstances, it is not possible for the Internal Revenue Service to take the necessary steps to protect the interests of the United States in the collection of its tax revenues.

It was this concern which led to the enactment of Section 7425. Plumb, Federal Tax Liens (3d ed.), p. 275. The conclusion of the District Court, in effect, voids the specific notice requirements of Section 7425(c)(1). Moreover, it is quite clear that Section 7424 of the Code, allowing the United States to intervene, which the District Court found sufficient to protect the Government's interest, is expressed in permissive rather than mandatory language,<sup>11/</sup> and it is well established that a party is not estopped or otherwise barred from raising its claim under such circumstances. See Chase National Bank v. Norwalk, 291 U.S. 431, (1934). If actual notice, as provided in Section 7425(c)(1), had been given, and the Government had not attempted to intervene or to redeem the property, then the statute provides for discharge. Sec. 7425(b)(2). Nothing in the statutes, however, provide for

<sup>11/</sup> Section 7424, Appendix, infra.

other means of discharging the lien. Cf. United States v. Brosnan, 363 U.S. 237 (1960) regarding discharge prior to the Federal Tax Lien Act of 1966.

Furthermore, as the Assistant Secretary's comments, supra, indicate, it is unreasonable to assume that the Internal Revenue Service can monitor all of the various types of foreclosure proceedings to insure its interests are protected. This is not to say, of course, that its unrecorded liens may never be discharged. It seems apparent, however, that Congress in dealing with this problem in the Federal Tax Lien Act of 1966 was striking a balance between the public and private interests and, as a result of this balancing, provided that when nonjudicial sale proceedings are used, the Government's lien is protected if filed 30 days prior to redemption day and no notice is given. This does not create an unreasonable burden on a redeeming party-- he need only review the lien book within 30 days of his redemption date and, if a tax lien is recorded, give actual notice under Section 7425(c)(1). Clearly this is more reasonable than placing a duty of continuous review of all "strict foreclosure" proceedings on the local district director's office. In short then, the supposed equities indicated in the court's opinion not only beg the question but ignore the realities of the situation.

The District Court (R. 15-16) also seems to indicate that Vermont's "strict foreclosure" proceeding is a "plenary action" and that, notwithstanding the lack of a "judicial sale" of the property, the lien is controlled by Section 7425(a) of the Code.



This was apparently the basis for the court's determination that the Temporary Treasury Regulation, referred to above (p. 12), was "inapposite."<sup>12/</sup> (R. 18.) The court's confusion seems to result from the use of the word "plenary" proceedings in the Committee Report (H. Rep. No. 1884, supra, p. 26)<sup>13/</sup> and in the Regulations (Temporary Regulations under the Federal Tax Lien Act of 1966, § 400.4-1(a)(1)).<sup>14/</sup> Both the Committee Reports and the Regulations, however, make it plain that the use of the adjective "plenary" was to distinguish between proceedings resulting in judicial sales and nonjudicial sale proceedings. See also Plumb, supra, pp. 274-277. Thus even assuming that the nature of Vermont's "strict foreclosure" may have some attributes of a plenary proceeding, the proceedings are not to be considered "plenary" within the meaning of Section 7425(a) and the Regulations.

In sum, the Chemical Bank foreclosure action was not a proceeding which would discharge a federal tax lien under Section 7425(a), and since the lien was filed prior to the 30-day period, in order for the lien to be discharged, actual notice under Section 7425(c)(1) was required. Such notice was not given and, therefore, the lien was not disturbed. See Baum v. United States, U.S.T.C., par. 9415 (S.D.N.Y., April 24, 1974).

<sup>12/</sup> The court also distinguished the regulation on the ground that the regulation discusses "foreclosure under a certificate of entry" which is not used in Vermont. Whatever the difference there may be between a "certificate of entry" and a "writ of possession," issued in Vermont foreclosures, is surely a difference of semantics rather than of substance.

<sup>13/</sup> See page 11, supra.

<sup>14/</sup> See page 11, supra.

CONCLUSION

The judgment of the District Court should be reversed and the case remanded with instructions to dismiss the complaint.

Respectfully submitted,

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MAY, 1976.



CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing four copies thereof on this 7<sup>th</sup> day of May, 1976, in an envelope with postage prepaid, properly addressed to him as follows:

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 7424 [as amended by Sec. 108, Federal Tax Lien Act of 1966, P.L. 89-719, 80 Stat. 1125]. INTERVENTION.

If the United States is not a party to a civil action or suit, the United States may intervene in such action or suit to assert any lien arising under this title on the property which is the subject of such action or suit. The provisions of section 2410 of title 28 of the United States Code (except subsection (b)) and of section 1444 of title 28 of the United States Code shall apply in any case in which the United States intervenes as if the United States had originally been named a defendant in such action or suit. In any case in which the application of the United States to intervene is denied, the adjudication in such civil action or suit shall have no effect upon such lien.

SEC. 7425 [as added by Sec. 109, Federal Tax Lien Act of 1966, supra]. DISCHARGE OF LIENS.

(a) Judicial Proceedings.--If the United States is not joined as a party, a judgment in any civil action or suit described in subsection (a) of section 2410 of title 28 of the United States Code, or a judicial sale pursuant to such a judgment, with respect to property on which the United States has or claims a lien under the provisions of this title--

(1) shall be made subject to and without disturbing the lien of the United States, if notice of such lien has been filed in the place provided by law for such filing at the time such action or suit is commenced, or

(2) shall have the same effect with respect to the discharge or divestment of such lien of the United States as may be provided with respect to such matters by the local law of the place where such property is situated, if no notice of such lien has been filed in the place provided by law for such filing at the time such action or suit is commenced or if the law makes no provision for such filing.



If a judicial sale of property pursuant to a judgment in any civil action or suit to which the United States is not a party discharges a lien of the United States arising under the provisions of this title, the United States may claim, with the same priority as its lien had against the property sold, the proceeds (exclusive of costs) of such sale at any time before the distribution of such proceeds is ordered.

(b) Other Sales.--Notwithstanding subsection (a) a sale of property on which the United States has or claims a lien, or a title derived from enforcement of a lien, under the provisions of this title, made pursuant to an instrument creating a lien on such property, pursuant to a confession of judgment on the obligation secured by such an instrument, or pursuant to a non-judicial sale under a statutory lien on such property--

(1) shall, except as otherwise provided, be made subject to and without disturbing such lien or title, if notice of such lien was filing or such title recorded in the place provided by law for such filing or recording more than 30 days before such sale and the United States is not given notice of such sale in the manner prescribed in subsection (c)(1); or

(2) shall have the same effect with respect to the discharge or divestment of such lien or such title of the United States, as may be provided with respect to such matters by the local law of the place where such property is situated, if--

(A) notice of such lien or such title was not filed or recorded in the place provided by law for such filing more than 30 days before such sale,

(B) the law makes no provision for such filing, or

(C) notice of such sale is given in the manner prescribed in subsection (c)(1).

(c) Special Rules.--

(1) Notice of Sale.--Notice of a sale to which subsection (b) applies shall be given (in accordance with regulations prescribed by the Secretary or his delegate) in writing, by registered or certified mail or by personal service, not less than 25 days prior to such sale, to the Secretary or his delegate.

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28 U.S.C.:

§ 2410 [as amended by Sec. 201, Federal Tax Lien Act of 1966, supra]. Actions affecting property on which United States has lien.

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter--

- (1) to quiet title to,
- (2) to foreclose a mortgage or other lien upon,
- (3) to partition,
- (4) to condemn, or
- (5) of interpleader or in the nature of interpleader with respect to,

real or personal property on which the United States has or claims a mortgage or other lien.

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(c) [as amended by Sec. 201, Federal Tax Lien Act of 1966, supra] A judgment or decree in such action or suit shall have the same effect respecting the discharge of the property from the mortgage or other lien held by the United States as may be provided with respect to such matters by the local law of the place where the court is situated. However, an action to foreclose a mortgage or other lien, naming the United States as a party under this section, must seek judicial sale. A sale to satisfy a lien inferior to one of the United States shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem, except that with respect to a lien arising under the internal revenue laws the period shall be 120 days or the period allowable for redemption under State law, whichever is longer, and in any case in which, under the provisions of section 505 of the Housing Act of 1950, as amended (12 U.S.C. 1701k), and subsection (d) of section 1820 of title 38 of the United States Code, the right to redeem does not arise, there shall be no right of redemption. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head (or his delegate) of the department or agency of the United States which has charge of the administration of the laws in respect to which the claim of the United States arises.

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12 Vt. Stat. Ann.:

§ 4526      Foreclosure of real or personal property

A mortgage or a security agreement constituting a lien on both real and personal property, to secure the payment of a debt, whether evidenced by one or more instruments, may be foreclosed in an action under this subchapter.

§ 4528      Decree foreclosing equity of redemption; writ of possession

If a decree is made foreclosing the right of redemption, the time of redemption shall be six months from the date of the decree unless a shorter time be ordered. If the premises are not redeemed agreeably to the decree, the clerk of the court may issue a writ of possession. Such writ shall have the same force and effect and be executed in the same manner as similar writs issued after Judgment by a court of law in ejectment proceedings.

§ 4531.    Strict foreclosure exception

In action for foreclosure, if a lien or interest in such realty is held by any person or federal agency which may not be foreclosed by strict foreclosure pursuant to federal law, a decree may be entered providing for such period of redemption as the court may determine, and providing for a sale of the mortgaged premises at the conclusion of such period if said premises are not redeemed, and for the time, manner and notice of sale, if required, and the application of the proceeds therefrom.

§ 4531a    Foreclosure; power of sale

When a power of sale is contained in a mortgage and the plaintiff in the complaint, or the defendant in his answer requests a sale, the court may upon entry of judgment of foreclosure order that the property be sold pursuant to such power and the court may further determine the time and manner of the sale. The plaintiff shall thereupon execute the power of sale and do all things required by it or by the court. However, no sale of a dwelling house of two units or less when currently occupied by the owner as his principal residence may take place within seven months of service of the foreclosure complaint, unless the court finds that the occupant is making waste of the property or the parties mutually agree after suit to a shorter period.

Vermont Rules of Civil Procedure:

RULE 80.1. FORECLOSURE OF MORTGAGES

(a) Remedy in Ejectment Abolished. The action of ejectment for foreclosure of a mortgage is hereby abolished. Proceedings for foreclosure shall be by civil action under the Rules of Civil Procedure as modified by this rule.

(b) Complaint. The complaint in an action for foreclosure shall set forth the name of the mortgagor and mortgagee, the date of the mortgage deed, the description of the premises, the debt or claim secured by the mortgage, and any assignment of the mortgage, and shall pray that defendant's equity of redemption in the premises be foreclosed.

(c) Summary Judgment; Default. Plaintiff may file and serve with his complaint a motion for summary judgment, which, for purposes of Rule 56, shall be treated as though supported by affidavits and shall be noticed for hearing 20 days after the date of service upon defendant. If defendant fails to file an affidavit disclosing facts constituting a defense in the manner and within the time provided in Rule 56, the clerk shall enter defendant's default in accordance with Rule 55(a) and judgment of foreclosure shall thereupon be entered in accordance with Rule 55(b)(2).

(d) Time of Redemption. The time of redemption shall, unless otherwise ordered, be as provided by law and shall run from the date of the entry of judgment. Motions to shorten the time of redemption shall be filed and served with the complaint. Such motions shall be heard on oral testimony, unless otherwise ordered by the court, with reasonable notice to defendant if he has appeared.

(e) Accounting. Unless there has been a hearing by the court or a master on the amount due the plaintiff, or defendant has approved the form of judgment in writing, plaintiff shall, after the court has granted judgment of foreclosure, request the clerk to take an accounting. The clerk, upon six days' notice to defendant if he has appeared, shall proceed to take an accounting and find the amount due in equity. Such accounting shall be made upon forms furnished by the state. A copy thereof shall be submitted by plaintiff with the form of judgment.

(f) Form of Judgment. Plaintiff shall submit and serve a form of judgment, as provided in Rule 58, within 60 days after the date on which the court grants judgment. If plaintiff fails to submit the form within the required time, a default and judgment by default shall be set aside as a matter of course; judgment other than by default shall be modified on motion of defendant to enlarge the time of redemption.





UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

May 7, 1976

Address Reply to the

Division Indicated

and Refer to Initials and Number

SPC:GEA:CDPowell:esp  
5-78-410

A. Daniel Fusaro, Esquire  
Clerk, U.S. Court of Appeals  
for the Second Circuit  
Room 1702, U.S. Courthouse  
Foley Square  
New York, New York 10007

Re: Francesco Galesi v. United States of  
America, Internal Revenue Service  
(C.A. 2 - 76-6055)

Dear Mr. Fusaro:

We are transmitting herewith for filing with your Court on behalf of the Appellant in the above-entitled case ten copies of the brief and ten copies of the record appendix.

We are forwarding four additional copies indicated below to counsel for the Appellee, together with a copy of this letter.

Sincerely yours,

SCOTT P. CRAMPTON  
Assistant Attorney General  
Tax Division

By: *Gilbert E. Andrews/eah*  
GILBERT E. ANDREWS  
Chief, Appellate Section

Enclosures

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